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15 Honorable Karen A. Overstreet
16 Chapter 11

17
18 UNITED STATES BANKRUPTCY COURT
19 WESTERN DISTRICT OF WASHINGTON
20 AT SEATTLE

21 In re
22
23 CONSOLIDATED MERIDIAN FUNDS, a/k/a
MERIDIAN INVESTORS TRUST, et al.,
Debtors.

24 Consolidated Case No.: 10-17952

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1 In addition, the Trustee now acknowledges that the centerpiece of his testimony to this
2 Court – the prejudice he supposedly suffered due to having been denied all access to accounting
3 records like trial balances and loan ledgers – was, in his lawyer’s phrase, “inartfully worded.”
4 See Opposition at p. 11. This is certainly true, if by “inartfully worded” the Trustee means
5 “knowingly false.” The Trustee testified not just once but multiple times that he had **no access**
6 **whatsoever** to trial balances and loan ledgers. Now, faced with incontestable evidence to the
7 contrary, the Trustee admits that Moss Adams did, in fact, produce the very trial balances and
8 loan ledgers he testified a few months ago were so critically absent. Dkt No. 1112, ¶3.

9 The Trustee’s misstatements at the evidentiary hearing have infected the Court’s April
10 5, 2013 Memorandum Decision (“Decision”) with manifest error. Indeed, many of the “unique
11 facts” relied upon by the Court hinged upon testimony the Trustee now acknowledges was
12 inaccurate. For instance:

- 13 • The Court’s finding that “it was not even possible to ascertain what might be
14 missing” from Moss Adams’ document production is negated by the Trustee’s
15 own testimony that (i) the “key” documents were trial balances and loan ledgers
16 and (ii) his admission that Moss Adams, in fact, produced these documents.
- 17 • The Court’s finding that the Trustee was “hampered [in] his ability to accurately
18 determine the assets of the companies and Berg” is negated by the Trustee’s
19 admission that he had access to trial balances and loan ledgers.
- 20 • The Court’s finding that the Trustee’s situation “worsened on August 27, 2010,
21 when the FBI seized all of the records of the Meridian and Berg entities,” and
22 that “[w]ithout adequate records, the Trustee was attempting to reconstruct
23 Berg’s financial records from Berg’s personal Quickbooks data” is negated by
the evidence that the Trustee had access to Quickbooks records for all of the
Meridian Funds, and the evidence that the FBI never seized any of the electronic
records of Meridian (only paper records for which there was an electronic copy).
- 24 • The Court’s finding that Moss Adams failed to produce documents as they were
25 kept in the ordinary course of business is negated by the evidence that its PDF
and server documents were copied onto server folders, then directly to discs, and
the Trustee’s counsel’s own admission that these documents were produced in
such fashion.

MOSS ADAMS LLP’S REPLY IN SUPPORT OF MOTION FOR
RECONSIDERATION - 2

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1 During the evidentiary hearing, the Trustee used his testimony to paint a dramatic word
2 picture of being lost in the darkness, unable to determine the assets and liabilities of the
3 Meridian Funds. This testimony had consequences: the Court highlighted the Trustee's
4 testimony in several places in its April 5, 2013 Memorandum Decision ("Decision"), and found,
5 based on this testimony, that the Trustee was hampered by the absence of these documents in
6 his ability to fulfill his duties as Trustee. The Trustee's recent admission that, in fact, he
7 possessed the documents the Court believed he did not have should cause the Court to
8 reconsider whether the (now very different) "unique facts" of this case are sufficient to justify a
9 contempt finding.

10 **II. ARGUMENT**

11 **A. The Contempt Finding Is Based on Manifest Legal Error**

12 Neither the Trustee's briefing nor the Decision identified a single case in which a non-
13 party was held in contempt for violating a Rule 2004 subpoena without an intervening court
14 order. Rather, numerous cases have held just the opposite, emphasizing that courts will not
15 hold non-parties in contempt for violating a subpoena absent an actual court order compelling
16 such compliance. The reason for these holdings is clear: an intervening court order "permits
17 judicial scrutiny of the discovery request" and "specifically informs the recalcitrant party of its
18 obligations." *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1364-65 (2d Cir. 1991). In
19 his recently-filed Opposition, the Trustee has still not cited a single case where a court actually
20 found a non-party in contempt under even remotely similar circumstances. The absence of
21 legal authority to support the Decision, combined with the collapse of the "unique facts" relied
22 upon by the Court in overcoming the absence of legal authority, should lead this Court to
23 reconsider its Decision.

24 **B. The Contempt Finding Is Based on Manifest Factual Errors**

25 The Decision concluded that this case presented "unique facts" that overcame the
26 absence of case law authorizing contempt for violation of a subpoena without an intervening
27

1 court order. Those unique facts were erroneous, however. First, the Decision found that the
2 Trustee could not tell what, if anything, was missing from Moss Adams' production. Decision
3 at 20. In the Motion, Moss Adams demonstrated that this finding was contradicted by the
4 Trustee's own testimony. Specifically, the Trustee testified that he was a CPA, and based on
5 his experience as an auditor, he quickly concluded that Moss Adams document production did
6 not contain any trial balances or loan ledgers. The Trustee does not dispute this point in his
Opposition.

7 Second, the Decision relied upon the Trustee's testimony that "his inability to obtain the
8 trial balances for the Meridian and Berg companies hampered his ability to determine the assets
9 of the companies and Berg." Decision at 21-22. The Court concluded that "based upon the
10 Trustee's testimony, Moss Adams failure to fully comply with the Subpoena hampered the
11 Trustee both with regard to his duties to marshal the estates' assets and his efforts to evaluate
12 the estates' claims against Moss Adams ." *Id.* at 22.

13 Specifically, at the evidentiary hearing, the Trustee testified as follows:

14 Q. At any point in time prior to late 2012 did Moss Adams ever produce any documents
relating to a trial balance for any of the funds, to the best of your knowledge?

15 A. No.

16 2/14/2013 Tr. (Afternoon) at 187:12-15 (emphasis added).¹ The Trustee further testified
17 repeatedly that the trial balances and loan ledgers were key and that he believed that he did not
18 receive any from Moss Adams:

19 • "If I had a loan trial balance, I would have been able to say which loans were bogus
20 and which loans were real. I would have been able to identify loans that had been
taken off or were no longer on the listing that would have allowed me to identify
theft, as when I immediately came in, Berg was still stealing from the estate." *Id.* at
181:23-182:4

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23 ¹ For the Court's ease of reference it has attached relevant excerpts from the February 14, 2013 evidentiary
hearing as Exhibit A to the Declaration of Steven W. Fogg ("Fogg Decl."), filed herewith.

1 • “I didn't have a loan trial balance. I didn't have the detail associated with a loan trial
2 balance, all of which are normal in the workpapers from my past experience as an
3 auditor.” *Id.* at 184:22-185:7

4 • “On the top of 26, the nature of cash through MPM and the no access to Meridian
5 servers. So these are again issues that, again, if I had the workpapers, I would have
6 been able to see the loan trial balance for each of the years of the audited funds, been
7 able to identify which loans were bogus in each of those years and would have been
8 able to rebuild the asset side of the equation.” *Id.* at 185:25-186:7.

9 • “Q. In your experience as a CPA, would you expect an audit firm to maintain copies
10 of trial balances relating to an audit client?
11 A. Yes, it's a key source document. It's the backbone of the audit.
12 Q. Please explain to the Court what effect, if any, Moss Adams' failure to produce
13 those key documents had on your ability to perform your duties as trustee?
14 A. Here again, in looking at these funds, I was unable to get a loan trial balance or
15 the information necessary to ascertain what loans did exist at those points in time.”
16 *Id.* at 187:22-188:8.

17 The Trustee's testimony about his access to trial balances and loan ledgers was false. As set
18 forth in the Motion and Second Urquhart Declaration, Moss Adams' August 2010 production
19 contained hundreds of pages of trial balances and loan ledgers, rendering the testimony just
20 cited false. In his Opposition, the Trustee now concedes that his testimony at the evidentiary
21 hearing was false, and that Moss Adams produced trial balances and loan ledgers in 2010. Dkt.
22 No. 1111 at 16.² The Decision's finding that the Trustee was hampered by the lack of any trial
23 balances and loan ledgers is thus erroneous.

24 Third, the Decision found that when the Trustee assumed his duties in July 2010, he
25 “found a complete lack of accounting records. That situation worsened on August 27, 2010,
26 when the FBI seized all of the records of the Meridian and Berg Entities.” Decision at 13.
27 The Decision further found that “[w]ithout adequate records, the Trustee was attempting to
28 reconstruct Berg's financial records from Berg's personal Quickbooks data. The Trustee

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² This concession should have come much earlier. Before closing argument, Moss Adams showed that trial
30 balances and loan ledgers were in the August 2010 production. Instead of correcting his client's false
31 testimony, Mr. Avenatti did just the opposite, representing to the Court that “the assertions by Moss Adams and
32 their counsel are completely false relating to this trial balance issue Because we can show that it was
33 demonstrably false, those statements.” *See* Fogg Decl., Ex. C (3/1/13 Tr. at 13:10-17) (emphasis added).

1 testified that a key source of information would have been the audit work and loan trial
2 balances which he contends he did not receive from Moss Adams in August 2010.” *Id.*

3 These findings were based on the Trustee’s testimony that (i) while he had access to
4 Darren Berg’s Quickbooks, “I did not have access to Meridian’s books,” 2/14/2013 Tr.
5 (Afternoon) at 184:23-185:3 (emphasis added), and (ii) that “the FBI and Department of Justice
6 came in and seized all the financial records of the company on August 27th. So at that point I
7 had no financial records,” *id.* at 184:2-10 (emphasis added). This testimony was also false.
8 According to an FBI 302 interview that Moss Adams was able to obtain only after the
9 evidentiary hearing, the Trustee had access to both Berg’s Quickbooks and the Quickbooks for
10 “all Meridian Funds.” *See* Dkt. No. 1068, Ex. A (emphasis added). That FBI 302 interview
11 also made clear that the Quickbooks records for “all Meridian Funds” were downloaded to a
12 personal server for the Trustee. There was no evidence submitted at the evidentiary hearing or
13 in the Trustee’s declaration filed in opposition to this Motion that this personal server was ever
14 seized by the FBI. Moreover, in the declaration that Mr. Berg submitted to this Court, he
15 testified that the FBI seized only Meridian’s paper files on August 27, not any of its electronic
16 files. *See* Dkt. No. 1093 ¶4, 11. Mr. Berg also stated that a complete forensic image of all
17 Meridian’s files was made by, and stored at, Lighthouse. *Id.* ¶8; *see also* Exhibit P4 from
18 evidentiary hearing (August 26, 2010 FBI 302 Interview of the Trustee, stating that “Lighthouse
19 was making a digital image of the Meridian computers”). In short, the new evidence
demonstrates that the Trustee had access to Meridian’s financial records, including the loan
20 ledgers and trial balances contained therein, at all relevant times.³

21 In his Opposition, the Trustee does not contest any of these facts. Instead, he now
22 claims that he “did not mean to convey that he did not have *any* of Meridian’s books, but rather
23 meant to convey *I did not have all of Meridian’s books.*” Dkt. No. 1112 ¶4. This is an

³ The Trustee’s assertion that Moss Adams could have introduced this evidence earlier ignores that it was not until the Trustee took the stand at 5:30 PM (after Moss Adams had rested), that he claimed for the first time that those documents were missing.

astonishing admission. First, as the Trustee well knows, “I did not have *any* records” is a far cry from “I did not have *all* the records.” The Trustee’s testimony was designed to convey that he was forced to go to extreme lengths (e.g., shipping bank records to India) because of a complete absence of accounting records. The Court relied upon this testimony in its Decision, and the Trustee now admits this testimony was at the very least mistaken.

Equally important, the Trustee’s testimony regarding a complete absence of accounting records was not a mere slip of the tongue, as he repeated the same claim repeatedly on direct examination, and reiterated the theme on cross-examination. For instance, the Trustee was cross-examined about a statement he made to the FBI that Mr. Berg’s Quickbooks told “the whole story.” In explaining this statement, the Trustee reiterated that he only had access to Berg’s personal Quickbooks and that, as a result of the FBI’s “seizure” (really, copying) on August 27, he had no financial records. The evidence is now clear that the Trustee had access not just to Mr. Berg’s records, but to Meridian’s records, and that the FBI did not seize all of the records on August 27, 2010, as he had testified.

Fourth, the Decision found that Moss Adams did not produce documents as they were kept in the ordinary course of business. Moss Adams demonstrated in its Motion that this finding was incorrect. The evidence was undisputed that Moss Adams electronically copied documents directly from PFX to a file on its server, then to a disc, then delivered that disc to counsel for the Trustee. Moss Adams thereafter provided the Trustee with an index to assist his review. Moreover, as Moss Adams pointed out, Mr. Avenatti previously represented to this Court that Moss Adams' August 2010 production contained documents "as they were kept in the ordinary course of business." Fogg Decl, Ex. D (12/7/2012 Tr. at 103:13-20) ("Further, we were entitled, Your Honor, to the files as they were kept in the ordinary course of business Interestingly enough, Your Honor, that's what we got in the initial production."). The Trustee cannot hide from this admission. That these documents were not provided to the Trustee with the proprietary PFX software does not change the fact that they were copied directly and

1 produced as maintained. Here too, the absence of this software was obvious to the Trustee, and
2 nothing prevented the Trustee or its counsel from following up with Moss Adams for the
3 software, if they believed such software was necessary to adequately review the documents.

4 In sum, the “unique facts” found by the Court were erroneous, in large part due to the
5 Trustee’s incorrect testimony. For this reason, this Court should grant Moss Adams’ Motion
6 for Reconsideration.

7 III. CONCLUSION

8 Contempt against a non-party for violation of a Rule 2004 subpoena should be limited to
9 cases where there is a court order compelling production. But even if unique facts in some case
10 may warrant contempt in the absence of a court order, this is not such a case. The Trustee has
11 acknowledged that great swaths of his testimony to this Court were incorrect, an admission that
12 renders inaccurate much of the factual framework set forth in the Decision. The Court may
13 believe that it can address this situation by refusing to award the Trustee the fees he has
14 requested for the prejudice he claims to have suffered, but Moss Adams contends, with respect,
15 that this remedy would be unjust and inadequate. A finding of contempt should not be based
16 upon testimony that is admittedly false. To avoid this unjust outcome, this Court should grant
17 Moss Adams’ motion to reconsider.

18 DATED this 4th day of June, 2013.

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MOSS ADAMS LLP’S REPLY IN SUPPORT OF MOTION FOR
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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2013, I electronically filed the foregoing with the Clerk of the U.S. Bankruptcy Court for the Western District of Washington using the CM/ECF system, which will send notification of such filing to the following:

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MOSS ADAMS LLP'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION - 9

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